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In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The issues presented are stated in a companion case, *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.* S. Ct. No. 82-41, filed July 9, 1982, which the Commission believes should be considered along with the instant Petition.

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No. 82-

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 2a-6a) is reported at 684 F.2d 86. The opinion of Division 1 of the Commission (App. C, *infra* 10a) is unreported. The opinion of the Restriction Removal Board of the Commission (App. B, *infra*, 7a-9a.) is also unreported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, 2a-6a) was entered on July 27, 1982. A petition for rehearing was not sought because the Commission believes that this case presents identical issues to those in *Interstate Commerce Commission* v. *Steere Tank Lines, et al.*, No. 82-41, in which a Petition For a Writ of Certiorari was filed on July 9, 1982. It is the Commission's view that since these cases raise identical issues, they should

be considered together. A petition for rehearing in this case could have delayed disposition by the Court on the Petition for A Writ of Certiorari in No. 82-41.

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. 10101 and 10922 are set forth at Appendix D, *infra*, 11a-20a. Pertinent provisions of 49 C.F.R. 1137 *et seq.*, are set forth at App. E, *infra*, 21a-33a.

STATEMENT

1. By the passage of the Motor Carrier Act of 1980, P. L. 96-296, 94 Stat. 793 (1980), (1980 Act) Congress formulated more liberal entry standards for all motor carriers of property than had existed under the Motor Carrier Act of 1935. To further the pro-competitive spirit of the 1980 Act, and as particularly pertinent to the instant proceeding, Congress enacted a new section to enable existing motor carriers to remove "unduly narrow restrictions" and "reasonable broaden" their overly-narrow existing authority. Pub. L. 96-296, §6, 94 Stat. 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h).

In accordance with the Congressional mandate, the Commission promulgated restriction removal rules and guidelines designed to process expeditiously applications of motor carriers of property seeking to remove operating restrictions or broaden unduly narrow authorizations in their outstanding certificates.[1]

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[1]The Commission's implementation of the provisions of 49 U.S.C. (Supp. IV) 10922(h) may be found in the rules and guidelines promulgated in Ex Parte MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), codified at 49 C.F.R. 1137 *et seq.* Certain provisions of those guidelines, but not the procedural rules, were remanded for recon-

2. The United States Court of Appeals for the Fifth Circuit reviewed the application of the Commission's rules to restriction removal proceedings in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1982). In that case, the court found that the requirement governing new certificates that an applicant be "fit, willing, and able" to perform the authorized service (49 U.S.C. (Supp. IV) 10922(b)) was equally applicable to applicants under 49 U.S.C. (Supp. IV) 10922(h) seeking a removal of restrictions from existing authorities. The court thus remanded that proceeding in which the Commission has expanded authority to transport "spent silica gel, catalyst, in bulk" to "commodities in bulk."

3. In the instant proceeding, Port Norris applied pursuant to the Commission's restriction removal rules, to broaden its existing authority to transport cullet (broken glass) in bulk to commodities in bulk. It did not seek a broadening of its territorial authority. Port Norris provided the Commission with all the information required by 49 U.S.C. (Supp. IV) 10922(h)(2) and the Commission's rule implementing that Section, 49 C.F.R. 1137.10(c), and submitted a copy of its existing certificate. Specifically, Port Norris explained how its requested broadening of authority would allow it to offer a wide variety of services to shippers of bulk commodities, improve its efficiency, and increase competition, all of which are specific goals of the National Transportation Policy. 49 U.S.C. (Supp. IV) 10101(a). Notice of the application was published in the Federal Register. Com-

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sideration by the Commission in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), as clarified on mandamus in *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982). A Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been filed seeking review of the *ATA* decision and mandamus. See *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82-86 (filed July 16, 1982).

ments were received from two motor carriers, Ritter Transportation and Schwerman Trucking Company.[2]

The Commission's Restriction Removal Board authorized the requested expansion to commodities in bulk. It found that the broadening sought by Port Norris would improve efficiency, allow Port Norris to offer cost saving to its customers and further the goals of the National Transportation Policy. It also concluded that, contrary to the commentors' suggestions, the requested expansion was permissible under the Commission's restriction removal rules. 49 C.F.R. 1137.21(b)(3).

Ritter Transportation petitioned for administrative review of the Board's decision,[3] arguing that the authority was "unreasonably broad" and suggesting that only a more limited expansion to "clay, concrete, glass, or stone products" was permissible under the statute. 49 U.S.C. (Supp. IV) 10922(h).

A division of the Commission rejected the appeal stating that Ritter had failed to demonstrate the presence of "extraordinary circumstances" necessitating the Commission's review. 49 C.F.R. 1137.14(a).

4. On judicial review, the United States Court of Appeals for the District of Columbia Circuit vacated the decision and remanded the proceeding to the agency. (App A, *infra*, 2a-6a).

The court followed the *Steere* decision closely and found that the "fit, willing, and able" standard (49 U.S.C. (Supp. IV) 10922(b)) is an element of the restriction removal provision, 49 U.S.C. (Supp. IV) 10922(h).

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[2]49 U.S.C. (Supp. IV) 10922(h)(2) provides that interested parties should have the opportunity "to comment" on restriction removal proceedings.

[3]A decision of the Restriction Removal Board is a final action, the review of which is discretionary with the Commission. 49 C.F.R. 1137.14(c).

Although acknowledging that the applicant detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, the court found the application and the Commission's consideration of it deficient for its failure to address the issue of whether the applicant is "fit, willing, and able to provide the transportation authorized by the certificate." (App. A, *infra*, 4a-5a). The court stated (App. A, *infra*, 5a):

> We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal sub silentio §10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I, supra*. The term "reasonably broaden," as used in §10922(h)(1)(B)(i), includes a consideration of whether an applicant is "fit, willing, and able."

The court also agreed with the holding in *Steere* that, because of the expeditious nature of restriction removal proceedings, an applicant's showing of fitness, willingness, and ability to perform the expanded service "need not be elaborate." (App. A, *infra*, 6a).

Because the Commission's decision in this proceeding was served before the October, 1981 decision in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981) which partially invalidated the restriction removal rules and before the decision in *Steere* which first articulated the proposition that the "fit, willing, and able" criteria is pertinent in restriction removal proceedings, Ritter did not raise before the Commission the issue of applicant's fitness. The court did not address this issue but instead relied heavily upon the decision in *Steere* to support its view that Port Norris failed to establish a *prima facie* case that it was fit, willing, and able to

transport all commodities which could be transported in bulk under its expanded certificate.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are thoroughly set forth in the *Petition for a Writ of Certiorari in Interstate Commerce Commision* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41 filed July 9, 1982, which involves a similar fact pattern and identical issue as the instant case. As explained in the Petition in that companion case, by engrafting the fit, willing, and able test onto the restriction removal provision of the Act, 49 U.S.C. (Supp. IV) 10922(h), the court has fettered the Commission's discretion in implementing the deregulatory policies of the 1980 Act. The court has, in effect, substituted its judgment for that of the Commission as to what constitutes a reasonable broadening of an existing certificate by holding that an expansion from one commodity in bulk to commodities in bulk cannot be a reasonable expansion under the statute unless the applicant demonstrates and the Commission finds that the applicant has shown itself to be fit, willing, and able to transport all possible groups of commodities that would be authorized under the expanded authority.

The decisions in both *Steere* and the instant proceeding impose an even heavier burden on an applicant seeking only an expansion of existing authority than one seeking to enter an entirely different field of service under a new certificate of operating authority by requiring that the former carrier not only demonstrate that its service will promote the goals specifically enunciated in 49 U.S.C. (Supp. IV) 10922(h) as the basis for obtaining authority, but also that it demonstrate that it is fit, willing, and able to transport all possible groups of commodities that

would be authorized under its expanded authority[4]. The magnitude of the non-statutorily required additional burden which the court below would impose on an applicant for a commodity broadening is starkly presented by this proceeding. The lower court explicitly held that applicant had detailed how expansion of its authority as requested would conserve energy resources, improve efficiency and increase both competition and revenues (App. A, *infra*, 5a). Thus, the court, in effect, held that applicant had satisfied the statutorily prescribed criteria for obtaining an expansion of existing authority, but nonetheless remanded the matter to the Commission. Even if viewed solely as a matter of statutory interpretation, the court below, as the court in *Steere*, has improperly infringed upon the agency's right to have upheld its interpretation of a statute which it helped draft (See *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940)) and is charged with implementing "unless there are compelling indications that it is wrong." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981), quoting from *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Because the United States Court of Appeals for the District of Columbia Circuit, as the court in *Steere*, has

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[4]Although the court in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981) expressed the view that the "fit, willing, and able" test may be applicable to restriction removal proceedings, it was not until the decision in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1981) that the court clarified its position and explicitly held the fitness test to be part of an applicant's prima facie case in a restriction removal proceeding. Thus there can be no doubt that the propriety of the courts in engrafting the fit, willing, and able test upon the certificate broadening provisions of the act is appropriately before this Court in our petition for writ of certiorari in No. 82-41.

emasculated the restriction removal provision, 49 U.S.C. (Supp. IV) 10922(h), by imposing on applicants a requirement that was not intended by Congress, we respectfully request that the Court consolidate this Petition with that in *Steere* and consider the arguments presented in the *Steere* petition in conjunction with the instant proceeding.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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OCTOBER 1982

APPENDIX

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2116

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

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Argued May 21, 1982

Decided July 27, 1982

Judgment entered this date ←

Michael D. Bromley with whom *Chester A. Zyblut* was on the brief, for petitioner.

Colleen J. Bombardier, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

respondents. *John Broadley*, Attorney, Interstate Commerce Commission also entered an appearance for respondent Interstate Commerce Commission. *Robert B. Nicholson* and *George Edelstein*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

William P. Jackson, Jr. was on the brief, for intervenor.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *Senior District Judge*: Ritter Transportation Inc. seeks to review and set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co. Inc. to broaden the commodities authorized in its certificate of public convenience and necessity. A certificate issued in 1973 authorized Fort Norris to transport "cullet in bulk" (broken glass) between points in 12 states and the District of Columbia. Following the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), the ICC, pursuant to the Act and rules and guidelines promulgated by the Commission, granted Port Norris' application to broaden its authority to "commodities in bulk". Ritter contends, *inter alia*, that the Commission arbitrarily failed to consider whether Port Norris is "fit, willing, and able" to transport "commodities in bulk". For the reasons set forth below we vacate the ICC's order granting Port Norris' application and remand to the Commission for further proceedings.

The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit. . . ." 49 U.S.C.A. § 10922 (h) (1) (B) (i) (West. Supp. 1981) (emphasis added). However, as noted by the Fifth Circuit Court of Appeals,

> In mandating the removal of unreasonable restrictions, the statute does not dispense with the [Act's] primary requirement that every carrier be "fit, willing and able to provide the transportation to be authorized by the certificate." [42 U.S.C.A. § 10922 (a) (1) (A) (West Supp. 1981)].

American Trucking Associations, Inc. v. *I.C.C.*, 659 F.2d 452, 464 (5 Cir. 1981).

In *Steere Tank Lines, Inc.* v. *I.C.C.*, 666 F.2d 255 (5 Cir. 1982) (*"Steere I"*), the court reviewed an ICC decision involving the identical question here presented.[1] The court concluded:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

Id. at 258. Because the applicant had made no such showing, the case was remanded for reconsideration in the light of *American Trucking Associations.*[2]

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[1] The Commission recognizes that the facts in *Steere I* "are substantially similar to the facts in this case," but argues that the Steere decision "imposes an unreasonable burden upon applicants for restriction removal."

[2] The same question was raised in *Steere Tank Lines, Inc.* v. *I.C.C.*, 667 F.2d 490 (5 Cir. 1982) (*"Steere II"*). Again recognizing the necessity of finding an applicant "fit, willing,

We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal *sub silentio* § 10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I, supra.* The term "reasonably broaden", as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing, and able."

The Commission properly noted that the scope of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," 5 U.S.C. § 706(2)(A). We recognize that under this standard the scope of review is a narrow one. The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). "[A] finding that a decision is not 'arbitrary or capricious' clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence. . . ." *Doe* v. *Hampton*, 566 F.2d 265, 271 n. 15 (D.C. Cir. 1977).

Although Port Norris' application detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, no where does it indicate that Port Norris is "fit, willing, and able to provide the transportation authorized by the certificate." The ICC's decision to grant the application is likewise void of any consideration of these "relevant factors". Absent such a consideration, it cannot be said that the ICC "*reasonably* broadened" the

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and able" to provide expanded service, the case was dismissed as moot after the ICC granted a new certificate in which the applicant was determined to be "fit, willing, and able" to provide bulk service in separate proceedings on the new application.

categories of property authorized by the applicant's certificate. Its decision was arbitrary because the Commission failed to consider the relevant factor of whether the applicant was "fit, willing, and able" to perform the expanded service.

We agree also with the holding in *Steere I*, *supra*, that the showing that an applicant is fit, willing, and able "need not be elaborate" and that the form and details of the showing "are, in the first instance matters that should be addressed to the Interstate Commerce Commission." Specifically, the time restraints of the Act contemplate the use of expedited procedures in restriction removal cases. *American Trucking Associations*, 659 F.2d 461.[3] The ICC retains broad discretion, within statutory limits, to define appropriate commodity categories. *Id.* at 464-65. Likewise, it has discretion in determining what facilities and equipment may be required.[4]

We vacate the order under review and remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

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[3] The Commission correctly notes that "Congress did not intend to invoke the full panoply of APA formal hearing requirements" and that the APA does not "require full-fledged adversary-type hearings in restriction removal cases."

[4] We agree with the Commission that an applicant should not "be compelled to buy all equipment necessary to transport every conceivable commodity encompassed by the expanded authority before the applicant even receives the authority it seeks."

APPENDIX B

RRB

Service Date
June 5, 1981

INTERSTATE COMMERCE COMMISSION DECISION

No. MC-110841 (Sub-No. 22)X

PORT NORRIS EXPRESS CO, INC.–
COMMODITIES IN BULK
(Port Norris, NJ)

Decided: May 28, 1981

By an application filed March 12, 1981, Port Norris seeks to remove restrictions (under the provisions of 49 CFR Part 1137) in its Sub-No. 16 certificate to broaden the commodity description from cullet, in bulk, to "commodities in bulk." Ritter Transportation, Inc. and Schwerman Trucking Co. have filed comments in opposition to the application. Applicant has replied.

Ritter and Schwerman argue that the involved broadening is unreasonable because it will allow applicant to expand from one commodity to all commodities in bulk. This, commentors argue, is beyond the scope of commodity broadening contemplated by the Commission in promulgating 49 CFR 1137.21(b)(3).

Based upon the information presented, we conclude that a grant of the application will reduce the consumption of energy, will offer cost savings and improved efficiency and will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a). Contrary to the commentors' contentions, the commodity broadening requested by applicant is allowed under our rules and in fact, is precisely the type of broadening contemplated by 49 CFR 1137.21(b)(3). The application is granted as set forth in the appendix.

It is ordered:

The restriction removal application is granted to the extent set forth in the appendix.

The attached *certificate* will become effective 45 days after the service date of this decision, unless the Commission stays the effective date by accepting an appeal for consideration.

After the effective date, operations can begin upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agents (49 CFR 1044), and tariffs (49 CFR 1310).

APPENDIX

To operate as a *common carrier,* by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *commodities in bulk,* between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and the District of Columbia.

APPENDIX C

D2 Service Date
P Sep 24, 1981

INTERSTATE COMMERCE COMMISSION
DECISION

No. MC-110841 (Sub-No. 22)X

PORT NORRIS EXPRESS CO, INC.–
COMMODITIES IN BULK
(Port Norris, NJ)

Decided: September 18, 1981

We have considered the record in this proceeding, the pleading of Ritter Transportation, Inc., seeking a stay of the effectiveness of the certificate issued thereto and acceptance of its appeal of the restriction removal board's decision, and applicant's reply.

We conclude that Ritter has failed to show the presence of any extraordinary circumstances requiring our entertainig of its appeal. 49 CFR 1137.14(c).

It is ordered:

A stay is denied and the appeal is rejected.

Operations may begin after the effective date of the certificate and upon compliance with the requirements set forth in the Code of Federal Regulations: 49 CFR 1043, 1044 and 1310.

This decision will be effective on its date of service.

By the Commission, Division 2, Acting as an Appellate Division, Commissioners Gresham, Gilliam, and Taylor. Commissioner Taylor did not participate.

JAMES H. BAYNE,
Acting Secretary.

[SEAL]

APPENDIX D

TITLE 49, UNITED STATES CODE

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price

options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101 (a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

(E) transportation by motor vehicle of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

(5) Notwithstanding any other provision of law, any carrier holding authority under paragraph (4)(D) of this subsection operating one or more commercial motor vehicles with a gross vehicle weight rating of 10,000 pounds or more shall be subject to commercial motor vehicle safety regulations promulgated by the Secretary of Transportation pursuant to this title with respect to its entire operations, including the operations of commercial motor vehicles with gross vehicle weight ratings less than 10,000 pounds.

(6) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of certificates to which the provisions of paragraph (4)(E) of this subsection apply.

(7) No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—

(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(8) No motor contract carrier of property may protest an application to provide transportation filed under this subsection.

(9) Notwithstanding the provisions of paragraph (4) of this subsection, the provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide transportation for the United States Government of used household goods which transportation is incidental to a pack and crate service on behalf of the Department of Defense.

(c) A person must file an application with the Commission for a certificate to provide transportation as a motor common carrier or water common carrier. The Commission may approve any part of the application or deny the application. The application must—

(1) be under oath;

(2) contain information required by Commission regulations; and

(3) be served on persons designated by the Commission.

(d)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify—

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which, any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

(2) Under regulations of the Commission, a motor common carrier may occasionally deviate from the regular routes, or the places specified in the certificate, or both.

(3) If a motor common carrier transports passengers, the Commission may authorize transportation of the passengers only over a regular route and between specified places, except to the extent the carrier is authorized to provide special or charter transportation.

(4) A certificate of a motor common carrier to transport passengers may include authority to transport—

(A) newspapers, baggage of passengers, express, or mail in the same motor vehicle with the passengers; and

(B) baggage of passengers in a separate motor vehicle.

(e) Each certificate issued to a person to provide transportation as a water common carrier shall specify each route over which, and each port between which, the carrier may provide transportation.

(f)(1) A motor common carrier may provide transportation under a certificate only if the carrier complies with conditions the Commission finds are required by public convenience and necessity, including conditions—

(A) on extending routes of the carrier; and

(B) to carry out requirements established by the Commission under this subtitle.

(2) The Commission may prescribe necessary conditions under which a water common carrier provides transportation, including conditions on extending routes of the carrier.

(3) The Commission may prescribe conditions when the certificate is issued and at any time thereafter. The Commission may not prescribe a condition preventing—

(A) a motor common carrier or water common carrier from adding to its equipment and facilities or its transportation within the scope of the certificate to satisfy business development and public demand; or

(B) a water common carrier, if the carrier has authority to provide transportation over completed parts of a waterway project authorized under law, from extending its transportation over the uncompleted parts of the project when opened for navigation to satisfy business development and public demand.

(g) A certificate issued under this section does not confer a proprietary or exclusive right to use the public highways or public waterways.

(h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon

the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

(i) A person holding (1) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (2) a permit issued under section 10923 of this subchapter to provide transportation as a motor contract carrier of property, may transport property under the certificate in the same motor vehicle and at the same time as property under the permit.

(j) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

APPENDIX E

TITLE 49, CODE OF FEDERAL REGULATIONS

PART 1137—REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

Subpart A—General

Sec.

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1137.27 Limited term authority.
1137.28 Availability of other application procedures.
1137.29 Impact of restrictions removal.

AUTHORITY: 49 U.S.C. 10321 and 10922(h); 5 U.S.C. 553.

SOURCE: 45 FR 86757, Dec. 31, 1980, unless otherwise noted.

Subpart A—General

§ 1137.1 Purpose.

These regulations govern applications filed by motor carriers of property seeking to remove operating restrictions from their certificates or permits in order to:

(a) Broaden reasonably the categories of property authorized by the carrier's certificate or permit;

(b) Authorize transportation service to intermediate points on the carrier's routes;

(c) Provide round-trip authority where only one-way authority exists;

(d) Eliminate unreasonable or excessively narrow territorial limitations; or

(e) Eliminate any other restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

These regulations implement of 49 U.S.C. 10922(h)(1)(B) and 10922(h)(2).

§ 1137.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or to broaden authority in certificates and permits issued pursuant to applications filed before December 28, 1980.

§ 1137.3 Definitions.

(a) *County.* "County" means (1) a county in any State, a judicial district in Alaska, and a parish in Louisiana and (2) a city, town, or village in any State which is not administratively part of a county, New York, NY, and Washington, D.C., and their commercial zones as defined by the Commission.

(b) *STCC.* "STCC" means the Standard Transportation Commodity Code Tariff currently on file with the Commission at any given time.

Subpart B—Procedures

§ 1137.10 Form and content of application.

(a) *Form and filing requirements.* No application form is prescribed for filing applications under these rules. Applicants shall submit an original and one copy of their applications to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423. Applicants shall also file a copy of the complete application in the regional office of the Commission for the region in which they are domiciled. Applications shall be typewritten or printed on paper measuring approximately 8½ by 11 inches, with a 1½ inch left-hand margin. Only the original need be signed. A check or money order payable to the Interstate Commerce Commission covering the applicable filing fee must accompany the application. The envelope containing the application and check shall be clearly marked "RESTRICTION REMOVAL APPLICATION". Also each application shall be clearly marked, in the upper right-hand corner of the top page: "RESTRICTION REMOVAL".

(b) *Information which shall accompany the application.* The application shall contain the following information, in the same order as set forth below:

(1) The exact name and address of the applicant and the docket number assigned by the Commission to the applicant's authorities.

(2) The name, address, and telephone number of applicant's representative.

(3) A copy of the certificate or permit from which applicant seeks to have restrictions removed or which it proposes be broadened.

(4) A proposed draft of the certificate or permit (commodity and territorial descriptions) with the re-

strictions removed or the authority broadened as proposed, together with sufficient information for the Commission to determine readily the precise portions of the existing authority which applicant proposes be modified. The redrafted certificate or permit shall be in the same format as the original so that, if the application is granted, it can be issued promptly without further redrafting by the Commission.

(5) In the case of an application to remove a restriction of a type found by the Commission to be inappropriate (see § 1137.25(7) of this part), a reference to the Commission decision in which an identical or substantially similar restriction was found inappropriate.

(6) A caption summary (an original and one copy) of the modifications proposed, suitable for publication in the FEDERAL REGISTER. The caption summary shall include *an accurate summary of the restrictions applicant seeks removed, the authority applicant seeks broadened under these rules, or the authority the applicant would hold if its application were granted. It shall also include the authority (including specific sub numbers) which would be superseded by a grant of the application. For example, a caption summary could state that, "The application seeks to modify Sub-Nos. 1-10, by broadening the commodity description in the authorities from liquid chemicals to chemicals or allied products; by replacing the plantsite restrictions in the authorities with county-wide authority in X, Y, and Z Counties, IL; and by eliminating the in bulk restriction* in *all of the named authorities.* The caption summary shall be double-spaced on plain white paper (no letter heads). Each summary will be checked by Commission staff for its accuracy and *failure to describe accurately the changes applicant seeks may result in a rejection of the application.*

(c) *Information that shall accompany the application.* The application shall include a statement describing the effect of the proposal upon one or more of the following factors:

(1) The consumption of energy resources;

(2) Potential cost savings and improved efficiency;

(3) The provisions of the transportation policy set forth in 49 U.S.C. 10101(a); or

(4) The provision and maintenance of service to small and rural communities and small shippers.

(d) *Related restriction removal.* Applicants are expected to combine reasonably related restriction removal requests or requests for broadening of authority in a single application. Two categories of requests are generally considered related: (1) requests related to the same certificate or permit authority. An example of this category would be a carrier which holds a one-way certificate and desires to obtain backhaul authority as well as to broaden its territorial and commodity authority under these rules. (2) Requests seeking to remove the same restriction, or restrictions having a similar effect, from different authorities. An example of this would be a carrier which desires to remove the same equipment restriction from a number of certificates under these rules. In applications combining requests as described above, each request shall be clearly marked and segregated, and each request shall comply with the requirements set forth in § 1137.10(b)(3), (4), (5), and (6). Failure to comply will result in a rejection of the application. Carriers are free to file consolidated applications which do not fit into the two categories described above.

(e) *Incomplete applications.* Due to the time limits imposed by 49 U.S.C. 10922(h)(2), the Commission cannot await the supplementing of incomplete appli-

cations or make extensive revisions to draft FEDERAL REGISTER captions. The failure to submit a complete application or to include a proper caption summary will result in rejection of the application.

(f) *Repeat applications.*—A certificate or permit can be reformed under these rules more than one time. However, a restrictions removal application shall not be filed before a preceding application to reform the same authority has been processed by the Commission.

§ 1137.11 Notice.

Notice to the public of the filing of an application under these rules will be given by the Commission through publication of a caption summary in the FEDERAL REGISTER. Applicant shall deliver (by mail or in person) a copy of the caption summary to the State transportation board or official of applicant's domicile. Applicant shall mail a copy of the application to this State board or official or any State through which the operations described in the application would be performed upon their written request. Applicant shall make copies of the application available for public inspection at its principal place of business and at the office of its representative if at a different location. A copy of the application is also available for inspection at the ICC, Washington, D.C., Office of the Secretary.

§ 1137.12 Participation of interested persons.

Any interested person may comment on the applicant's proposal. Comments (an original and one copy) shall be filed with the Commission within 25 days of the date of publication of notice of the application in the FEDERAL REGISTER. The envelope containing the comment and the comments shall be

clearly marked "RESTRICTION REMOVAL COMMENTS." Comments shall be directed to either (1) the merits of the particular proposal, or (2) whether the proposal should properly be considered under these rules.

§ 1137.13 Furnishing a copy of the application package to interested persons.

Applicant's representative is required to furnish a copy of the application package to interested persons after publication. The request must be in writing and must contain a check or money order for $10, payable to applicant's representative. Applicant's representative need not supply copies to any person not sending the appropriate payment. Applicant is required to mail the copy within 5 days of receipt of the request. Non-compliance with this section by applicant may result in dismissal of the application.

§ 1137.14 Disposition of the application.

(a) *Basis for determining the application.* Except in extraordinary circumstances, applications will be determined solely on the basis of the application itself and any comments that are received. There will be neither oral hearings nor the opportunity for the submission of evidence under modified procedure.

(b) *The Commission's decision.* Applications will be published in the FEDERAL REGISTER in the form of tentative decisions granting the authority requested. If no comments are filed, the application will stand granted at the *conclusion of the 25-day comment period*, unless the Commission, prior to that time, stays the effectiveness of the tentative decision.

(c) *Administrative finality and appeals.* A decision disposing of an application subject to these rules is a final action of the Commission. Review of such an action on appeal is discretionary and is

governed by the Commission's appeal regulations at 49 CFR 1100.98. Any party seeking review should specify the "extraordinary circumstances" involved in the proceeding to enable the Commission to extend the deadline for final Commission action an additional 90 days.

§ 1137.15 Compliance.

A reformed certificate or permit will be issued upon a grant of an application. Prior to beginning operations under the newly issued authority, compliance must be made with the following statutory and regulatory requirements: (a) for motor common carriers—49 CFR 1043, 1044, and 1310, and (b) for motor contract carriers—49 CFR 1043, 1044, and 1310.

Subpart C—Guidelines for Determining Applications

§ 1137.20 Scope of this subpart.

This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.

§ 1137.21 Commodity descriptions.

(a) *General commodities carriers.* Where a carrier is authorized to transport general commodities, restrictions having the effect of precluding the trans-

portation of classes A and B explosives are not considered unduly restrictive and are not normally subject to removal under these procedures. Other restrictions on the commodities which a general commodities carrier may transport are considered unduly restrictive and may normally be removed under these procedures.

(b) *Named commodities or limited classes of commodities.* Where a carrier is authorized to transport one or more named commodities, the authority is considered unduly restrictive and may normally be broadened under these procedures. The same is true where a carrier is authorized to transport a limited class of commodities, except as indicated in subsection (c) of this section. Commodity classes which carry designations of three digits or more in the Standard Transportation Commodity Code are normally considered unduly narrow. Use of these procedures is normally appropriate for applications which seek—

(1) To expend such a commodity authorization to the two-digit STCC level;

(2) To replace such an authorization with a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or,

(3) To replace such an authorization with a broader class description generally accepted by the Commission, such as commodities in bulk, commodities which because of their size or weight require special equipment, or oilfield commodities as described in *Mercer Extension-Oilfield Commodities*, 74 M.C.C. 459 (1946).

(c) *Commodities dealt in by a particular business.* Where a carrier is authorized to transport "such commodities as are dealt in by" a particular industry, such as mail order houses or retail grocery stores,

the authority is not considered excessively narrow, and applications for modification should not normally be filed under these procedures.

§ 1137.22 Intermediate point service.

Certificates which authorize regular-route service and preclude service at intermediate points on the carrier's service routes, either by way of a specific restriction against performing such service or by virtue of the fact that they allow service at certain intermediate points but fail to name other points, are considered unreasonably restrictive. Use of these procedures is appropriate for seeking removal of any restriction or operating condition which inhibits service at intermediate points on a regular-route carrier's service route.

§ 1137.23 Round-trip service.

Certificates or permits which authorize service in one direction only are considered unduly restrictive. Use of these procedures is appropriate for applications which seek return movement authority limited to the same commodities the carrier is authorized to transport on the outbound trip or applications which seek to expand the round-trip authority in a manner described in § 1137.21. Implied in the round-trip commodity description is materials, equipment, and supplies in both directions.

§ 1137.24 Territorial authority.

(a) *Less than county-wide authority.* Except as indicated in paragraph (b) of this section, authorizations to serve a territory less extensive than a county (including authorizations to serve named facilities or limited in a similar manner) are considered excessively narrow. Use of these procedures is normally appropriate for applications seeking the expan-

sion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Where an authorized service point is located within a given city as well as a county, an applicant can seek expansion of authority to the city (which includes implied authority of points in its commercial zone). Use of these procedures is also normally appropriate for applications to remove restrictions which preclude service at points or areas smaller than a county.

(b) *Service at facilities not precisely located.* Where a carrier has authority to serve a broad territory limited to service at the facilities of a specified person, company, or type of business, and where the precise location of the facilities, by reference to a city, county, or the like, is not apparent from the certificate or permit, the limitations are not considered excessively narrow, and applications for modification should not normally be filed under these procedures. These procedures can, however, be used to expand authority limited to a particular business' facilities at named points.

§ 1137.25 Miscellaneous restrictions.

Use of these procedures are normally appropriate for applications seeking the removal of the following types of restrictions, which the Commission considers to be contrary to the public interest.

(a) Restrictions which require or preclude the use of a specific type of equipment, such as "in tank vehicles" or "except in dump or hopper type equipment."

(b) Restrictions which have the effect of preventing a common carrier from participating in joint-line

service with another carrier or from handling traffic having prior or subsequent movement by any mode of transportation or type of carrier.

(c) Restrictions which impose size or weight limitations, or both. This does not include restrictions relating to shipments weighing 100 pounds or less under certificates granted under the so-called "fitness only" procedures in 49 U.S.C. 10922(b)(4)(D).

(d) Restrictions which specify Canadian and Mexican destinations or origins to be served, or designate specific port of entry points which must be used.

(e) Restrictions which limit the movements of a common carrier to transportation performed on freight forwarder bills of lading.

(f) Restrictions which limit the services an irregular-route carrier can provide to traffic moving through a named point, area, or State. For example, irregular-route authority "limited to the transportation of traffic moving from, to, or through points in (a specific State)."

(g) Restrictions which the Commission has found to be inappropriate and has refused to impose in another proceeding.

§ 1137.26 Contract carriers.

Where a permit of a contract carrier limits the carrier's territorial scope of service for a named shipper, shippers, or a class of shipper, such authority is considered unduly restrictive. Use of these procedures is normally appropriate for applications seeking to broaden the territorial scope of such permits. Such applications can request authority to serve the single-named shipper, shippers, or class of shippers, "between points in the United States." The commodity description in contract permits can be

broadened, and unreasonable restrictions removed, to the extent specified in Subpart C of this Section.

§ 1137.27 Limited term authoritv.

Certificates and permits limited to a specified duration ("term" limitation) can be modified under these procedures to the same extent as authority without a term limitation. Any modified authority approved under these rules will contain the same limitation as the original authority. These procedures cannot be used to remove the limited term condition from existing authority.

§ 1137.28 Availability of other application procedures.

The provisions of this subpart which describe as inappropriate the use of these procedures for applications seeking the elimination of certain types of restrictions or the modification of certain types of limited authorities should not be consulted as discouraging the filing of applications seeking such relief pursuant to the Commission's normal application procedures under 49 U.S.C. 10922(b) and 10923(b).

§ 1137.29 Impact of restrictions removal.

The Commission has found that, under normal circumstances, the elimination of restrictions or the modification of authorities designated in this subpart as unduly restrictive, unreasonable, excessively narrow, or contrary to the public interest will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a), and will assist in providing and maintaining service to small and rural communities and small shippers.

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No. 82-594

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

RITTER TRANSPORTATION, INC., *et al.*

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Fifth Circuit

BRIEF OF RESPONDENT RITTER TRANSPORTATION, INC., IN OPPOSITION

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BRIEF OF RESPONDENT RITTER TRANSPORTATION, INC., IN OPPOSITION

STATEMENT

By application filed March 12, 1981, Port Norris Express Co., Inc., pursuant to restriction removal regulations promulgated by the Interstate Commerce Commission,[1] sought to expand the scope of its Sub-No. 16 certifi-

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[1] The Commission's restriction removal regulations, codified at 49 C.F.R. Part 1137 *et seq.*, purported to implement the Motor Carrier Act of 1980. Pub. L. No. 96-296, 94 Stat. 793, 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). Those regulations, however, were overturned by another panel of the Fifth Circuit court of appeals which found that the asserted guidelines were in fact binding rules which exceeded the Commission's statutory authority. *American Trucking*

cate. The Sub-No. 16 certificate authorizes Port Norris Express to transport one commodity, namely, "cullet," in bulk, non-radially between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and the District of Columbia.[2] Relying on the Commission's restriction removal regulations, Port Norris sought to broaden the commodity description from one commodity, "cullet," in bulk, to "all commodities in bulk",[3] within the area heretofore mentioned.

In a decision served June 5, 1981, the Commission's Restriction Removal Board, over timely objections by Ritter Transportation, Inc., concerning the reasonableness of the proposed expansion, granted the application based upon the restriction removal regulations which were on appeal in *American Trucking Associations, supra*. Ritter Transportation filed an administrative appeal to no avail as Division 2, Acting as an Appellate Division, denied the stay and rejected the appeal.

Associations, Inc. v. *ICC*, 659 F.2d 452 (5th Cir. 1981) (the "ATA case"). Subsequently, that court issued a writ of mandamus to enforce its prior final opinion. *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1981), now pending on petition for a writ of certiorari as *Interstate Commerce Commission* v. *American Trucking Associations, Inc., et al.*, No. 82-86 (filed on July 9, 1982).

[2] The Commission, in the Sub 16 proceeding, found Port Norris fit, willing and able to transport only cullet, in bulk.

[3] The new authority, absent a finding of fitness, would allow Port Norris to transport, for example, hazardous materials, such as LPG, cryogenics, acids, corrosives, along with chemicals, petroleum products, liquid sweeteners, vegetable oils, et al. It would also allow Port Norris to transport numerous dry bulk commodities, including sugar, fertilizer, dry chemicals, salt, lime, sand, gravel, et al.

Ritter noted an appeal, which was docketed No. 81-2116. The United States Court of Appeals for the District of Columbia Circuit, in *Ritter Transportation, Inc.* v. *Interstate Commerce Commission*, 684 F.2d 86 (D.C. Cir. July 27, 1982), vacated the order under review and remanded the proceeding to the Commission for further proceedings consistent with its opinion. The Court held that the decision was arbitrary because the Commission failed to consider the relevant factor of whether Port Norris was "fit, willing and able" to perform the expanded service. Absent such a consideration, it cannot be said that the Interstate Commerce Commission "*reasonably* broadened" the categories of property authorized by the applicant's certificate. The Court, while agreeing with the holding in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1982), has, in effect, found that an expansion from one commodity (cullet), in bulk, to all commodities in bulk cannot be a reasonable expansion under the statute unless the applicant demonstrates and the Commission finds that the applicant has shown itself to be fit, willing and able to transport all possible groups of commodities that would be authorized under the expanded authority. The Court noted that the Interstate Commerce Commission retains broad discretion, within statutory limits, to define appropriate commodity categories.[4] No petition for rehearing was filed by the Commission to the decision of the Court.

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[4] The Commission's guidelines that specifically named commodities could be expanded from three different sources, namely, (1) The Standard Transportation Commodity Code (STCC); (2) other classifications set out in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 61 M.C.C. 766; or (3) any broader class description

The decision of the Court of Appeals is correct and plenary review by this Court is not warranted.

ARGUMENT

1. On petition, the Commission states that the reasons for granting this petition are noted in its *Petition for a Writ of Certiorari in Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41, filed July 9, 1982, which involves identical issues (Pet. 6). Central to the Commission's petition in this and No. 82-41 is that the Court of Appeals erred in requiring the Commission to make findings in restriction removal applications that an applicant demonstrate that it is fit, willing and able to perform the proposed service (Pet. 6). This issue is not subject to review. The issue has been laid to rest in the *ATA* case, *American Trucking Associations, supra.*, 659 F.2d at 464.[5]

The Commission's attempt to litigate this issue in this case is nothing more than an impermissible collateral attack on the *ATA* case. This Court has consistently recognized that a court should refuse to review an issue framed in an attempt to overturn a previous conclusive judgment on the same issue. *Allen* v. *McCurry*, ___ U.S. ___, 101 S.Ct. 411, 414-15 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). The Commission's rights on this issue were determined at the

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the Commission may have accepted in the past. Under (1) above, cullet would come within the STCC code of clay, concrete, glass or stone products.

[5] The opinion at 659 F.2d 452 is not subject to review pursuant to 29 U.S.C. 2101(c) because the Commission failed to file a timely petition seeking certiorari.

time the court of appeals decided *ATA*, and thus the agency was required to seek further review of that decision if it desired to urge any error. *See United States* v. *Hancock Truck Lines*, 324 U.S. 774, 778-80 (1945).

Moreover, the court of appeals for the District of Columbia Circuit was entitled to rely upon the finality of the original decision in *ATA* in reaching its subsequent decisions in this case. The Commission clearly was aware that the Commission's time for seeking further review of *ATA* had expired. Sound judicial policy demands that a court of appeals should follow established precedent, especially that within its own circuit. *Montana*, *supra*, 440 U.S. at 153-54.

2. The only other contention raised by the Commission is that the court of appeals improperly substituted its judgment for the agency's as to what constitutes a reasonable broadening of certificates under the statute (Steere Pet. 12-14). The lower court considered *only* the record before it. In so doing, it concluded that the term "reasonably broaden," as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing and able." The lower court concluded that the "record contains no evidence" to show that Port Norris had made "prima facie showing in its application that it is fit, willing, and able" to transport "all" bulk commodities. Thus, contrary to the Commission's assertion, the court of appeals did not broaden its original decision in the *ATA* case, but simply followed it. *Compare American Trucking Associations*, *supra*, 659 F.2d at 464.[6]

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[6] Moreover, there is consistency in the circuits which have considered the reasonableness of Commission actions permitting broadening of commodity descriptions. *Ritter Transportation, Inc.* v. *ICC*, 684 F.2d 86 (D.C. Cir. July 27, 1982), and *Ritter Transportation, Inc.* v. *ICC*, No. 82-1023 (D.C. Cir., decision dated January 14, 1983).

The Commission deliberately misreads the court's decision by asserting that expansion from one commodity to all commodities within a broad description is foreclosed "as a matter of law" (Pet. 6). As demonstrated by the remand, the court expressly left for the Commission's determination what factual showing of fitness, willingness, and ability is necessary to support the ultimate grant of authority. Consequently, the court of appeals has not in any manner infringed upon the Commission's discretion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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1030 Fifteenth St., N.W.
Washington, D.C. 20005
Counsel for Ritter Transportation, Inc.

January 1983

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2116

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

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Argued May 21, 1982
Decided July 27, 1982

Judgment entered this date ←

Michael D. Bromley with whom *Chester A. Zyblut* was on the brief, for petitioner.

Colleen J. Bombardier, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

respondents. *John Broadley*, Attorney, Interstate Commerce Commission also entered an appearance for respondent Interstate Commerce Commission. *Robert B. Nicholson* and *George Edelstein*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

William P. Jackson, Jr. was on the brief, for intervenor.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *Senior District Judge*: Ritter Transportation Inc. seeks to review and set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co. Inc. to broaden the commodities authorized in its certificate of public convenience and necessity. A certificate issued in 1973 authorized Fort Norris to transport "cullet in bulk" (broken glass) between points in 12 states and the District of Columbia. Following the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), the ICC, pursuant to the Act and rules and guidelines promulgated by the Commission, granted Port Norris' application to broaden its authority to "commodities in bulk". Ritter contends, *inter alia*, that the Commission arbitrarily failed to consider whether Port Norris is "fit, willing, and able" to transport "commodities in bulk". For the reasons set forth below we vacate the ICC's order granting Port Norris' application and remand to the Commission for further proceedings.

The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit. . . ." 49 U.S.C.A. § 10922 (h) (1) (B) (i) (West. Supp. 1981) (emphasis added). However, as noted by the Fifth Circuit Court of Appeals,

> In mandating the removal of unreasonable restrictions, the statute does not dispense with the [Act's] primary requirement that every carrier be "fit, willing and able to provide the transportation to be authorized by the certificate." [42 U.S.C.A. § 10922 (a) (1) (A) (West Supp. 1981)].

American Trucking Associations, Inc. v. *I.C.C.*, 659 F.2d 452, 464 (5 Cir. 1981).

In *Steere Tank Lines, Inc.* v. *I.C.C.*, 666 F.2d 255 (5 Cir. 1982) (*"Steere I"*), the court reviewed an ICC decision involving the identical question here presented.[1] The court concluded:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

Id. at 258. Because the applicant had made no such showing, the case was remanded for reconsideration in the light of *American Trucking Associations.*[2]

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[1] The Commission recognizes that the facts in *Steere I* "are substantially similar to the facts in this case," but argues that the Steere decision "imposes an unreasonable burden upon applicants for restriction removal."

[2] The same question was raised in *Steere Tank Lines, Inc.* v. *I.C.C.*, 667 F.2d 490 (5 Cir. 1982) (*"Steere II"*). Again recognizing the necessity of finding an applicant "fit, willing,

We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal *sub silentio* § 10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I*, *supra*. The term "reasonably broaden", as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing, and able."

The Commission properly noted that the scope of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," 5 U.S.C. § 706(2)(A). We recognize that under this standard the scope of review is a narrow one. The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). "[A] finding that a decision is not 'arbitrary or capricious' clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence. . . ." *Doe* v. *Hampton*, 566 F.2d 265, 271 n. 15 (D.C. Cir. 1977).

Although Port Norris' application detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, no where does it indicate that Port Norris is "fit, willing, and able to provide the transportation authorized by the certificate." The ICC's decision to grant the application is likewise void of any consideration of these "relevant factors". Absent such a consideration, it cannot be said that the ICC "*reasonably* broadened" the

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and able" to provide expanded service, the case was dismissed as moot after the ICC granted a new certificate in which the applicant was determined to be "fit, willing, and able" to provide bulk service in separate proceedings on the new application.

categories of property authorized by the applicant's certificate. Its decision was arbitrary because the Commission failed to consider the relevant factor of whether the applicant was "fit, willing, and able" to perform the expanded service.

We agree also with the holding in *Steer I*, *supra*, that the showing that an applicant is fit, willing, and able "need not be elaborate" and that the form and details of the showing "are, in the first instance matters that should be addressed to the Interstate Commerce Commission." Specifically, the time restraints of the Act contemplate the use of expedited procedures in restriction removal cases. *American Trucking Associations*, 659 F.2d 461.[3] The ICC retains broad discretion, within statutory limits, to define appropriate commodity categories. *Id.* at 464-65. Likewise, it has discretion in determining what facilities and equipment may be required.[4]

We vacate the order under review and remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

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[3] The Commission correctly notes that "Congress did not intend to invoke the full panoply of APA formal hearing requirements" and that the APA does not "require full-fledged adversary-type hearings in restriction removal cases."

[4] We agree with the Commission that an applicant should not "be compelled to buy all equipment necessary to transport every conceivable commodity encompassed by the expanded authority before the applicant even receives the authority it seeks."

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1023

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the Interstate Commerce Commission

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Argued December 2, 1982

Decided January 14, 1983

Chester A. Zyblut, with whom *Michael D. Bromley*, was on the brief for petitioner.

Craig M. Keats, Attorney, Interstate Commerce Commerce Commission, with whom *John Broadley*, General Counsel, *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, *Robert B. Nicholson* and *William J. Roberts*, Attorneys, Department of Justice, were on the brief for respondents.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

William P. Jackson, Jr. and *David C. Reeves*, were on the brief for intervenor.

Before: GINSBURG and SCALIA, *Circuit Judges*, and GESELL,* *United States District Judge* for the District of Columbia.

Opinion PER CURIAM.

PER CURIAM: Ritter Transportation, Inc. ("Ritter") seeks to set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co., Inc. ("Port Norris") to broaden the commodities its certificate of public convenience and necessity permits it to carry. A certificate served June 18, 1980, authorized Port Norris to transport "*(1) sand, gravel, clay, and stone*, and *(2) materials* used in the manufacture and distribution of glass, in bulk," within a specified territory. Appendix (App.) 3-4; 45 Fed. Reg. 53586 (1980). On July 2, 1981, Port Norris applied, pursuant to the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), to broaden its authority to transport "*(1) sand, (2) clay, concrete, glass or stone products*, and *(3) commodities in bulk*," within the same territory. App. 6. Notice of Port Norris' application was published in the Federal Register and Ritter submitted adverse comments. The ICC's Restriction Removal Board granted Port Norris' application on September 21, 1981, App. 39; Ritter's appeal to the Commission was denied on December 15, 1981. App. 84. Ritter then petitioned for review in this court as authorized by 28 U.S.C. § 2342(5).

Ritter contends that the ICC unlawfully failed to consider whether Port Norris is "fit, willing, and able" to carry all "commodities in bulk." For the reasons set forth in *Ritter Transportation, Inc. v. ICC*, 684 F.2d 86 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3448 (U.S. Oct. 4, 1982) (No. 82-594) ("*Ritter I*"), we agree. Accordingly, we vacate the ICC's order granting

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Port Norris' application and remand to the Commission for further proceedings.

In *Ritter I*, we held that the ICC's restriction removal mandate under the Motor Carrier Act of 1980 to "reasonably broaden the categories of property authorized by the carrier's certificate," 49 U.S.C.A. § 10922(h)(1)(B)(i), entails consideration whether the applicant is "fit, willing, and able" to provide the additional transportation for which it seeks authorization. 684 F.2d at 87. In so holding, we aligned this Circuit with precedent initiated in the Fifth Circuit, most immediately, *Steere Tank Lines, Inc. v. ICC*, 666 F.2d 255 (5th Cir. 1982), *reh'g denied*, 671 F.2d 1380 (March 8, 1982), *petition for cert. filed*, 51 U.S.L.W. 3013 (U.S. July 9, 1982) (No. 82-41) (*"Steere I"*). The parties in the case before us (*"Ritter II"*) are the same as in *Ritter I* and the issues raised are substantially the same.

Ritter I involved another certificate held by Port Norris; the certificate's commodities' authorization was broadened from "cullet in bulk" (broken glass) to "commodities in bulk." Our remand in *Ritter I* required Port Norris to show its fitness to perform the expanded service. We emphasized, however, that the fitness showing need not be detailed and that the Commission should use expedited procedures in ruling on commodity broadening requests.

The ICC's decision to broaden Port Norris' certificate in *Ritter II* was reached before *Steere I* and *Ritter I* were decided, and, in accordance with Commission policy in effect at that time, was not predicated on a finding that Port Norris was "fit" to carry "all commodities." The ICC now contends that such a finding was implicit in its decision. The Commission attempts to distinguish *Ritter I* by pointing to the different scope of the certificate Port Norris initially held in that case. In *Ritter I* Port Norris started with authority limited to one commodity, "cullet in bulk." In *Ritter II* Port Norris' origi-

nal certificate included all bulk materials used in glass manufacturing and distribution, as well as sand, gravel, clay, and stone.

We find the attempted distinction unpersuasive. Even if the ICC might reasonably have inferred that Port Norris was "fit" to carry all bulk commodities merely from the breadth of its prior authority to carry numerous itemized bulk commodities, there is no evidence in the record to suggest that the Commission ever considered or made such an inference.[1]

Ritter seeks further relief also sought, but not addressed by the panel, in *Ritter I*.[2] Ritter argues that the notice published in connection with Port Norris' application, 46 Fed. Reg. 37353 (1981), was deficient because it specified only the change in the commodities Port Norris sought authorization to carry, not the territory served. The ICC answers that existing regulations prescribe the scope of notice that is appropriate, and do not require a description of the affected territory when no change in that territory is sought. *See* 49 C.F.R. §§ 1137.10(b)(6), .11.[3] The Commission points out that any person

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[1] We note here, as we did in *Ritter I*, 684 F.2d at 87-88 n.2, that the ICC has commenced to determine, in restriction removal cases, the applicant's fitness for expanded commodities service. Steere Tank Lines, Inc. v. ICC, 667 F.2d 490 (5th Cir. 1982) ("*Steere II*"). We do not rule out Commission development of guidelines to facilitate these determinations. Prior operations of a described kind might well serve as a sufficient indicator of fitness for certain expansions.

[2] In *Ritter I*, the issue was initially raised in court; here, the argument was first tendered to the Commission.

[3] Ritter's counsel suggested at oral argument that the notice published in connection with Port Norris' application was exceptional in its failure to describe the territory affected, and stated that of the 48 other removal restriction applications published in the Federal Register with Port Norris', 46 included a description of territories. Brief for Petitioner at 45. The ICC's counsel answered that the notice of Port Norris' application was in the regular form for applications of its

may check an applicant's filing with the ICC to ascertain what territories it involves. *See* 49 C.F.R. § 1137.11.

A territorial description in *all* Federal Register notices of restriction removal applications might indeed help members of the public determine when they are interested in an application, without imposing a significant burden on the ICC or carriers applying for restriction removal. However, the issue is not properly presented in the instant proceeding. The courts of appeals have jurisdiction to provide direct review of ICC regulations, 28 U.S.C. § 2342(5), but such review must be sought within sixty days after the regulations issue in final form. 28 U.S.C. § 2344. The regulation challenged here issued December 31, 1980, 45 Fed. Reg. 86757; Ritter's petition for review was filed in this court on January 7, 1982. Ritter's petition is therefore not a timely request for direct review of the ICC's notice regulation.

Nor is this an appropriate occasion for indirect review of the regulation on the ground that Ritter was aggrieved by inadequate notice attending the ICC's December 15, 1981, final approval of Port Norris' restriction removal application. Ritter concedes that it had actual, timely knowledge of the territory in which Port Norris had authority to operate. Carriers seeking more informative Federal Register notice, however, are not left without a means to air their complaint. They may petition the ICC for rulemaking to amend 49 C.F.R. § 1137.11, the notice regulation. 5 U.S.C. § 553(e). If the ICC rejects such a petition, judicial review of that final order would be appropriate. *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807 (D.C. Cir. 1981).

The order under review is vacated and this matter is remanded to the Interstate Commerce Commission for further proceedings consistent with this opinion.

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type; the applications that included territorial descriptions involved requested changes in the territories served.

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-594

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1982

INTERSTATE COMMERCE COMMISSION,
PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PORT NORRIS EXPRESS CO., INC., IN OPPOSITION TO PETITION

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(703) 525-4050

QUESTIONS PRESENTED

Does the decision below, which requires findings in restriction removal proceedings on an applicant's fitness to provide service, have a significant or recurrent impact on the administrative processes of the Interstate Commerce Commission? Are the issues raised by petitioner therefore important enough to warrant this Honorable Court's consideration?

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No. 82-594

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

RITTER TRANSPORTATION, INC., et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PORT NORRIS EXPRESS CO., INC., IN OPPOSITION TO PETITION

STATEMENT

In March 1981, Port Norris Express Co., Inc. (Port Norris),[1] applied

1. Port Norris has no subsidiary or affiliate corporations. Neither is Port Norris a subsidiary of any other corporation.

under regulations published by the Interstate Commerce Commission (the Commission) at 49 CFR Part 1137[2] to broaden the restrictive commodity description "cullet, in bulk" contained in its certificate No. MC-110841, Sub No. 16, to the description "commodities in bulk." Port Norris submitted in support of its application all of the information required by 49 CFR 1165. That information did not include direct evidence demonstrating Port Norris' fitness, willingness and ability to transport commodities in bulk.

Comments on Port Norris' application were filed by Schwerman Trucking Company and Ritter Transportation, Inc. (Rit-

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2. Renumbered as 49 CFR 1165 by decision of the Interstate Commerce Commission in Ex Parte No. 55 (Sub-55), Revision and Redesignation of Rules of Practice, 47 Federal Register 49534 (November 1, 1982). These regulations will be referred to hereinafter by their new numerical designation.

ter). Port Norris replied to those comments.

By decision served June 5, 1981, the Commission's Restriction Removal Board granted Port Norris' application. While finding that Port Norris' evidence demonstrated that various public benefits would result from a grant of the application, the Restriction Removal Board did not make any findings concerning Port Norris' fitness, willingness and ability to provide service under the broadened grant of authority.

Ritter appealed the Restriction Removal Board's decision to a division of the Commission. The division rejected the appeal, finding that Ritter had not shown extraordinary circumstances warranting its consideration. Ritter then brought suit in the United States Court of Appeals for the District of Columbia

Circuit, seeking reversal of the Commission's action.

By decision entered July 27, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's action in granting Port Norris' request for broadening of its authority. The Court held that the Commission's challenged action was arbitrary because the Commission had failed to consider whether Port Norris was fit, willing and able to provide service under the broadened authority sought, thus ignoring a relevant factor in making its finding that the broadening granted was a reasonable broadening. Petitioner then filed the instant petition for writ of certiorari.

ARGUMENT IN OPPOSITION TO PETITION

Port Norris supported the Commis-

sion's position in the court below and continues to believe that the decision below was incorrect. However, Port Norris opposes the Commission's petition.

The issues presented are not significant. Port Norris disagrees with the Commission's interpretation that the decisions in Ritter Transportation, Inc. v. Interstate Commerce Commission, 684 F.2d 86 (D.C. Cir. 1982), and Steere Tank Lines, Inc. v. Interstate Commerce Commission, 666 F.2d 255 (5th Cir. 1982), require an applicant for restriction removal to prove fitness, willingness and ability to transport each and every commodity encompassed by a particular commodity description. Rather, Port Norris believes that a showing of fitness, willingness and ability to transport most of the commodities encompassed by a description would suffice. And since an elaborate showing of fitness, willingness and

ability to provide service is not necessary (Ritter Transportation v. ICC, 684 F.2d, at 88, Steere Tank Lines v. ICC, 666 F.2d, at 258), requiring the Commission to make fitness findings would put little regulatory burden on applicants and little additional administrative responsibility on the Commission. The Commission currently makes fitness findings in restriction removal proceedings, and has not demonstrated that making such findings has increased its administrative burden substantially.

The issues presented also have little significance because they are unlikely to recur. The number of restriction removal applications filed has fallen off sharply in recent months, causing the Commission to abolish its special Restriction Removal Board. See: Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor

Carriers of Property, (unprinted; Entire Commission), served December 13, 1982. [See Appendix A to this Brief.]

This decline in the number of restriction removal applications is likely to continue. Only authorities issued as a result of applications filed prior to December 28, 1980, may be revised under restriction removal regulations. 49 CFR 1165.2. [See Appendix B to this Brief.] Thus, the pool of authorities containing removable restrictions shrinks with each restriction removal application. It is likely, therefore, that processing restriction removal applications will continue to become an even less significant portion of the Commission's regulatory activities.

CONCLUSION

WHEREFORE, the foregoing consid-

ered, Port Norris prays that this Honorable Court deny the petition for writ of certiorari filed by the Commission.

Respectfully submitted,

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Post Office Box 1240
Arlington, VA 22210
Counsel of Record for
Port Norris Express
Co., Inc.

APPENDIX A

EC
FR-7035-01

SERVICE DATE
December 13, 1982

INTERSTATE COMMERCE COMMISSION

49 CFR PART 1165
EX PARTE NO. MC-142 (Sub-No. 1)

REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

AGENCY: Interstate Commerce Commission

ACTION: Final rules.

SUMMARY: The Commission is eliminating the special Restriction Removal Board. On January 15, 1981 (45 FR 3532), the Commission published notice of the establishment of a special Restriction Removal Employee Board. This Board has been delegated the functions set forth in 49 CFR 1011.6(1), which was added in that document. Under that section, the Board decides applications seeking to remove operating restrictions or to broaden unduly narrow authority in existing certificates and permits under the provisions of 49 CFR Part 1165 (formerly Part 1137). Although carriers may continue to avail themselves of the restriction removal procedures, the Commission has determined that the level of application filings no longer warrants the use of a special employee

board. Restrictions removal proceedings will be referred to the employee review boards of general jurisdiction for determination, as provided for at 49 CFR 1011.6(f).

EFFECTIVE DATE: December 20, 1982

COMMENTS: Since this is a final action taken to revise internal organizational matters, provisions for formal comments are unnecessary under 5 U.S.C. 553 (b)(A).

FOR FURTHER INFORMATION CONTACT:

Howell I. Sporn
(202) 275-7691

SUPPLEMENTARY INFORMATION:

SUMMARY

We are adopting the procedural rule set forth in the appendix.

This action is taken under the authority of 49 U.S.C. §10321 and 5 U.S.C. §553.

Decided: December 6, 1982.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Sterrett was absent and did not participate.

AGATHA L. MERGENOVICH
(SEAL) Secretary

Ex Parte No. MC-142 (Sub No. 1)

APPENDIX

49 CFR 1011 is amended by removing 49 CFR 1011.6(1).

APPENDIX B

49 CFR 1165.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or to broaden authority in certificates and permits issued pursuant to applications filed before December 28, 1980.

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-594

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-594

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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1. The Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10101 *et seq.*, provides that an applicant for motor carrier authority must make a prima facie showing that it is fit, willing, and able to provide the service for which it requests authority. 49 U.S.C. (Supp. IV) 10922(a)(1). The Act also authorizes the Interstate Commerce Commission to remove restrictions on motor carriers' existing authority where the removal would, among other things, "reasonably broaden the categories of property authorized by the carriers' certificate or permit" (49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i)) or "eliminate any other unreason able restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest" (49 U.S.C. (Supp. IV) 10922(h)(1)(B)(v)).

In this case, respondent Port Norris Express Co., a motor carrier authorized to transport cullet (broken glass) in bulk, applied under the restriction removal provisions to broaden

its authority to all commodities in bulk. The Commission granted the application in a summary opinion, without any finding that Port Norris was fit, willing, and able to transport all commodities in bulk (Pet. App. 7a-8a). On petition for review, the court of appeals "recognize[d] that * * * [its] scope of review is * * * narrow", but it ruled—explicitly following the Fifth Circuit's decision in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (1982) (*Steere I*), petition for cert. pending, No. 82-41 (filed July 9, 1982) — that "[t]he term 'reasonably broaden', as used in § 10922(h)(l)(B)(i) [the restriction removal provision], includes a consideration of whether the applicant is 'fit, willing and able' " (Pet. App. 5a). Because the Commission's order did not reflect any consideration of Port Norris's fitness, willingness, or ability, the court vacated the Commission's order and remanded for further proceedings. The court of appeals emphasized, however, that "the showing that an applicant is fit, willing, and able 'need not be elaborate' and that the form and details of the showing 'are, in the first instance, matters that should be addressed to the Interstate Commerce Commission.' * * * The ICC retains broad discretion * * * to define appropriate commodity categories * * * [and to] determin[e] what facilities and equipment may be required" (Pet. App. 6a, quoting *Steere I, supra*, 666 F.2d at 258). The court accordingly allowed the Commission to determine on remand, in the first instance, the amount of proof necessary to establish fitness, willingness, and ability.[1]

2. The restriction removal provisions of the Act do not expressly direct the Commission to consider whether a carrier is fit, willing, and able. The Commission urges (Pet. 6-7) that the court of appeals erred when it held that these

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[1]The Commission has sought certiorari; the United States was a party below (see 28 U.S.C. 2344, 2348) and is therefore a respondent in this Court.

factors are nevertheless relevant to the question whether a broadening of a carrier's certificate would be "reasonable" within the meaning of those provisions. Whether or not the Commission's position is correct, the holding of the court of appeals is not inconsistent with the view of any other court of appeals. It comes at an interlocutory stage of this litigation. Most important, that holding is so qualified and guarded that it is uncertain how substantial an impact it will have on the Commission's ability to carry out the statute's deregulatory scheme. In light of these circumstances we cannot urge the Court that this ruling should be reviewed at this time.

It should be noted that the court of appeals did not bar the Commission from granting Port Norris broader authority, and it is entirely possible that on remand the Commission will find it easy to conclude that the carrier is in fact fit, willing and able to provide the broader service. Indeed, given the court of appeals' emphasis on the deference owed the Commission, it is quite plausible to suppose that in virtually every case where the Commission would at present be inclined to broaden a carrier's authority, the court of appeals' "fit, willing and able" test could be easily satisfied.

Recent decisions of the Fifth Circuit, whose holding in *Steere* was closely followed by the court of appeals, suggest that the "fit, willing, and able" requirement will be interpreted, in our view correctly, to impose only a minimal burden on applicants.[2] For example, the Fifth Circuit recently suggested that an applicant meets its burden by demonstrating that "it is willing and has the financial

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[2]Indeed, a principal objective of the Motor Carrier Act of 1980 was to ease the regulatory licensing burdens on those desiring to engage in the interstate transport of goods. The Act, for example, reduced the evidentiary showing that a new applicant must make. See 49 U.S.C. (Supp. IV) 10922(a); H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 12-14 (1980).

resources to obtain the equipment" needed to conduct the desired transportation. *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 103, 104 n.2 (5th Cir. 1982) (*Steere II*). See also *J.H. Rose Truck Lines* v. *ICC*, 683 F.2d 952, 955 (5th Cir. 1982) (fitness demonstrated through prior leasing experience); *J.H. Rose Truck Lines* v. *ICC*, 683 F.2d 943, 949 (5th Cir. 1982) (applicant need not own terminals if it arranges for truck maintenance and repair elsewhere); *Alamo Express, Inc.* v. *ICC*, 673 F.2d 852, 861 (5th Cir. 1982) (transportation to nine points from coast to coast sufficient to support nationwide grant of authority); *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957, 963 n.7 (5th Cir. 1982) (Commission need not require possession of specialized equipment and can infer fitness from past successful operations).

Moreover, the Commission recently held that an applicant with no current bulk equipment and no definite plans to provide bulk service is nonetheless fit, willing, and able to provide that service if it states that it is willing to accept a certificate that includes bulk authority so that it may allow itself flexibility in the future, and if it shows that it is able to acquire the equipment necessary to meet future demands as they arise. *Vinci's Express, Inc., Extension - Five New Jersey Counties*, No. MC-32505 (Sub. No. 10) (Mar. 26, 1982), petition for review pending *sub nom. Port Norris Express Co.* v. *ICC*, No. 82-3321 (3d Cir.). We believe this holding to be correct, and we see no basis for concluding at this time that any court of appeals would reject it.

Accordingly, there is substantial uncertainty about just what impact the court of appeals' decision will have on the Commission's ability to implement the national transportation policies set forth in the Motor Carrier Act of 1980. We

are therefore unable to conclude that the Commission's petition raises issues that warrant review by this Court at this time.[3]

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

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[3]As the Commission states (Pet. 6), the issue in this case is the same as that presented in *Steere I, supra*, and the court of appeals' holding in this case closely parallels the holding in *Steere I*. Our discussion therefore equally applies to the Commission's petition for a writ of certiorari in *Steere I*. To the extent that the petition for a writ of certiorari in *ICC v. American Trucking Associations, Inc.*, petition for cert. pending, No. 82-86 (filed July 16, 1982), presents the same issue, our discussion applies to it as well.

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No. 82-594

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO MEMORANDUM OF THE UNITED STATES AND RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEBRUARY 1983

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1. Respondent Port Norris Company asserts that the court of appeals decision in *Ritter* is not important enough to justify the Court's review. We are not surprised by Port Norris' position since it is opposing numerous Commission decisions which authorized the expansion of existing certificates and the granting of new authority to its competitors under the deregulatory policies of the Motor Carrier Act of 1980. See Nos. 81-2589; 81-2640; 81-2641; 81-3019; 82-3221; 82-3222; 82-3416; 82-3438; 82-3517; 82-3565; and 83-3028, *Port Norris Company, Inc.* v. *Interstate Commerce Commission and United States of America*, U.S.C.A., 3rd Cir.

2. The United States does not contest the Commission's view that the plain language of the restriction re-

moval provision, 49 U.S.C. (Supp. IV) 10922(h), does not call for an assessment of a carrier's fitness, willingness, and ability to perform the expanded service. It questions instead whether the court of appeals decision will substantially impair the agency's ability to implement the national transportation goals of the Motor Carrier Act of 1980. 49 U.S.C. (Supp. IV) 10101a. Whether the court of appeals imposition of an additional burden on restriction removal applicants will, as a practical matter, hinder the agency's use of its own procedures or its implementation of the congressional mandate is a matter peculiarly within the Commission's knowledge and expertise. In fact, the Commission's Restriction Removal Board which regularly processed applications for expanded authority has been closed down due to a lack of applications being filed. We believe this is due at least in part to potential applicants' perception that it is now easier to obtain a *new* certificate under Section 10922(b) than it is to obtain the expansion of an *existing* certificate in a restriction removal proceeding. Indeed, the D.C. Circuit has recently recognized [*B.J. McAdams, Inc.* v. *Interstate Commerce Commission and United States of America*, U.S.C.A., D.C. Cir., No. 82-1271 (decided January 14, 1983) (App. at 11a, n.13)]:

> *Steere* and *Ritter* I held that it should not be *easier* to obtain broad operating authority by removing restrictions from an initially narrow certificate than by applying for a new certificate (emphasis in original).

This acknowledgement directly conflicts with the recognition of the courts, including those in the Fifth and District of Columbia Circuits, that Congress intended to provide an expeditious process for the removal of restrictions and expansion of authorities. *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452, 461 (5th Cir. 1981), *petition for cert. filed*, 51 U.S.L.W.

3014 (U.S. July 16, 1982) (No. 82-86); *Ritter Transportation, Inc.* v. *ICC*, 684 F.2d 86 (D.C. Cir. 1982).

Not only is a restriction removal applicant subjected to the fitness test, as is an applicant for new authority, but it must still meet all the additional criteria specifically enunciated by Section 10922(h). Thus, the effect of the court of appeals decision has been to impede the Commission's ability to implement the restriction removal provision of the Act in accordance with Congressional intent.

Respectfully submitted.

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FEBRUARY 1983

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of February 1983, I have served true and accurate copies of the foregoing Reply to Memorandum of the United States and Respondents' Brief In Opposition to Petition for Certiorari, upon all parties of record, by first-class mail, postage prepaid, as follows:

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1271

B.J. McADAMS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Interstate Commerce Commission

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Argued December 2, 1982

Decided January 14, 1983

James W. Woods for petitioner.

Robert J. Grady, Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, and *Robert S. Burk*, Deputy General Counsel, Interstate Commerce Commission, were on the brief for respondents. *Robert B. Nicholson*, *Stephen F. Ross*, *John J. Powers, III*, Attorneys, Department of Justice, and *Henri F. Rush*, Associate General Counsel, Inter-

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of cost out of time.

state Commerce Commission, also entered appearances for respondents.

Before: GINSBURG and *Scalia, Circuit Judges*, and GESELL,* *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: B.J. McAdams, Inc. ("McAdams") seeks to set aside a decision of the Interstate Commerce Commission granting the application of Freight Express, Inc. ("Freight Express") to broaden the territories its certificate of public convenience and necessity permits it to serve. A certificate of August 29, 1980, authorized Freight Express to transport "[g]eneral commodities" (with some designated exceptions) between "the facilities of National Brands, Inc., Troy, MI, and Feather Lite Manufacturing Company, a Division of National Brands, Inc., at Hot Springs, AR, on the one hand, and, on the other, points in the United States, including Alaska but excluding Hawaii." Brief of the ICC at 14. On May 13, 1981, Freight Express applied, pursuant to the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), to broaden its authority to operate "[b]etween Oakland County, MI., and Garland County, AR., on the one hand and on the other all points in the United States." Appendix (App.) 4. Notice of Freight Express' application was published in the Federal Register and McAdams and its affiliates submitted adverse comments. The ICC's Restriction Removal Board granted Freight Express' application on July 30, 1981, App. 53; McAdams' appeal to the Commission was denied on January 7, 1982. App. 78. McAdams then petitioned for review in this court as authorized by 28 U.S.C. § 2342(5).

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

Three issues are raised on appeal. Does McAdams have standing to challenge this ICC decision? Did the ICC adequately assess the fitness of applicant Freight Express in the restriction removal proceeding? Did Freight Express sufficiently address, in its application, the factors the statute prescribes as grounds for removing certificate restrictions? For the reasons set forth below we uphold the ICC's decision granting Freight Express' application except insofar as it authorizes Freight Express to transport commodities to and from Hawaii.

I. STANDING

McAdams and Freight Express hold operating authority in the same territory.[1] This is enough, the Commission recognizes, to permit McAdams to file comments with the agency opposing broadened territorial authority for Freight Express.[2] But authority to carry

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[1] McAdams' certificate, Docket No. MC-134922 (Sub-No. 337), authorizes it to carry *general commodities* (except commodities in bulk, household goods as defined by the Commission, and classes A and B explosives), between points in the United States (except Alaska and Hawaii)." Reply Brief at 7.

[2] 49 U.S.C.A. § 10922(h)(2), applicable to removal of operating restrictions, calls for regulations affording "interested parties" the opportunity to comment. The relevant regulation, 49 C.F.R. § 1137.12, similarly provides that "[a]ny interested person may comment on the applicant's proposal." In connection with applications for new certificates, however, the 1980 Act imposes restrictive standing requirements for intervention in the Agency proceedings:

> No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—
>
> (A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;
>
> (ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and
>
> (iii) it has performed service within the scope of the application during the previous 12-month period or has, ac-

general commodities within the same territory does not suffice to support McAdams' petition for judicial review, the ICC argues.[3] To cross the standing threshold established by the "case or controversy" requirement of Article III of the Constitution,[4] McAdams must demon-

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tively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests ....

49 U.S.C.A. § 10922(b)(7). The reason for the failure of Congress and the Commission to impose equally stringent standing requirements for protests to restriction removal applications is not apparent.

[3] The Commission underscores that participation in administrative proceedings does not automatically qualify the participant to seek judicial review of the Agency's decision. *See, e.g.*, Sprunt & Son, Inc. v. United States, 281 U.S. 249, 254-55 (1930); Koniag, Inc. v. Andrus, 580 F.2d 601, 606, 611 (D.C. Cir.) *cert. denied*, 439 U.S. 1052 (1978).

[4] *See* Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (elements of standing, within the confines of Article III are actual or threatened injury fairly traced to the challenged action, and likely to be redressed by a favorable decision); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) (standing is one facet of "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III").

strate "injury in fact."[5] McAdams has not done this, the Commission maintains.

The ICC acknowledged at argument that the standing question it raises here is novel.[6] It is settled that a disappointed applicant for an exclusive license has standing to challenge the grant of the license to a competitor, *see, e.g., Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); it is equally clear that a business enterprise generally does not have standing to challenge the economic regulation of a competitor. *See, e.g.,*

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[5] *See id.* at 220-21; American Soc. of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). The statutes authorizing court review, 28 U.S.C. §§ 2342, 2344, in harmony with the constitutional requirement, specify that the petitioner be a party "aggrieved" by the agency's final order.

[6] This colloquy with ICC counsel took place at oral argument:

> Q: Aren't you asking us to do something rather novel? ... No case you cited involved this kind of situation where someone who holds an existing license is challenging a broadening of the grant of authority of a competitor ....
> A: That's right, there is no case on point.

See Dialysis Centers, Ltd. v. Schweiker, 657 F.2d 135, 138 (7th Cir. 1981) (corporation providing kidney dialysis services lacks standing to challenge administrative approval of competing facility). *But see* Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970) (sellers of data processing services have standing to challenge Comptroller of Currency's ruling that banks may provide similar services); Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968) (power company has standing to challenge expansion in TVA service area that threatens adverse competitive impact); Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979) (operator of nursing home has standing to challenge administrative finding of competitor's eligibility for federal subsidy); Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958) (operating radio station has standing to challenge FCC's award of license to competitor); Panhandle E. Pipeline Co. v. FPC, 169 F.2d 881 (D.C. Cir.) *cert. denied*, 335 U.S. 854 (1948) (existing natural gas supplier has standing to challenge certification of competitor).

Sprunt & Sons, Inc. v. *United States*, 281 U.S. 249, 254 (1930); *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686 (8th Cir.), *cert. denied*, 387 U.S. 945 (1967). But we know of no case that squarely addresses the standing of a non-exclusive licensee challenging a regulatory agency's grant of overlapping authority to a competitor.[7]

We need not decide whether the mere fact that two licenses entail overlapping *authority* confers standing on one licensee to challenge an agency's grant of the second license. In the case before us McAdams alleges, in addition to an overlap in authority, actual operations which the newly-granted authority will expose to competition with Freight Express. Specifically, McAdams states that it is "serving on a continuous basis within the scope of [Freight Express'] Restriction Removal Application (transporting general commodities between points in Oakland County, Michigan, and Garland County, Arkansas, on the one hand, and, on the other, points in the United States)." Reply Brief at 7.[8] In our view, existence of such exposure to competing *operations* within the same territory does suffice to satisfy

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[7] *But see* case cited *supra* note 6. The ICC refers to 49 U.S.C.A. § 10922(g) which provides that "[a] certificate issued ... does not confer a proprietary or exclusive right ...." However, a party can be "aggrieved" or "injured in fact" while suffering no injury to "property." United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[8] *See also* Reply Brief at 8 ("[I]t is ... highly probable, that [Freight Express] is transporting general commodities (with minor exceptions) on a coast-to-coast and border-to-border basis and is, therefore, in reality (from an economic perspective) in direct competition with *all* of [McAdams'] traffic."). McAdams' business address is in North Little Rock, Arkansas, *see* 46 Fed. Reg. 46418 (1981), a fact that lends credibility to McAdams' claim that it will be injured by an expansion of Freight Express' authority to serve all of nearby Garland County, Arkansas.

the "case or controversy" threshold. We leave for another day the question whether a licensee who alleges only overlapping authority—but no overlapping routes or shared customers—has standing to challenge in court the grant of a new or expanded license to a competitor.

The ICC invites us, alternately, to hold that McAdams, which itself has no authority to serve Hawaii, lacks standing to challenge the removal of Freight Express' Hawaii restriction. Brief of the ICC at 29-30.[9] If carriers are in actual, head-to-head competition in any region, however, each will be injured, in some degree, by *any* expansion of the other's territory. A carrier gains a competitive advantage in *all* areas it serves when it is granted broadened authority; the grant equips the carrier to offer better service to existing or potential customers for whose trade others operating in the region compete.

II. Fitness

Freight Express sought, and the ICC granted, the removal of two types of territorial restriction from Freight Express' certificate. The names of designated plant sites were replaced by those of the counties in which the plants were situated. And Hawaii was included with the rest of the United States in the description of territories Freight Express was allowed to serve.

McAdams protested to the Commission that Freight Express was engaged, with other carriers, in a conspiracy to obtain nationwide general commodities authority inconsistent with congressional intent, and through procedures intended to circumvent standard ICC review of requests for such authority. Freight Express, McAdams contended, was not "fit" to operate under the enlarged authority requested, indeed, it was not even

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[9] *See supra* note 1.

fit for the original grant of authority. App. 9. But the ICC held that a restriction removal proceeding, governed by rules designed to expedite decision, was not an appropriate occasion to explore McAdams' broad allegations of conspiracy. App. 53-54. The Restriction Removal Board therefore disregarded McAdams' charges and agreed, as Freight Express requested, to effect site-to-county expansions and to remove the restriction on service to Hawaii.

A. *Restriction removal and fitness*

In *Ritter Transportation, Inc.* v. *ICC*, 684 F.2d 86 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3448 (U.S. Oct. 4, 1982) (No. 82-594) ("*Ritter I*"), we considered the ICC's removal of restrictions on the commodities a carrier was allowed to transport. We held that the ICC's restriction removal mandate under the Motor Carrier Act of 1980 to "reasonably broaden the categories of property authorized by the carrier's certificate," 49 U.S.C.A. § 10922(h) (1)(B)(i), entails considering whether the applicant is "fit, willing, and able" to provide the additional transportation for which it seeks authorization. 684 F.2d at 87. In so holding, we aligned this Circuit with precedent initiated in the Fifth Circuit, most immediately, *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1982), *reh'g denied*, 671 F.2d 1380 (March 8, 1982), *petition for cert. filed*, 51 U.S.L.W. 3013 (U.S. July 9, 1982) (No. 82-41). We quoted, with approval, this passage from *Steere*:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should

be addressed by the Interstate Commerce Commission.

666 F.2d at 258.

The logic of *Ritter I* and its Fifth Circuit antecedents is applicable to the territorial restriction removals challenged here. In removing commodity or territorial restrictions, the ICC must consider the applicant's fitness to take on the expanded authority sought.[10] However, as explained below, the Commission need not entertain, in restriction removal proceedings, issues relating to a carrier's fitness to hold a prior certification. Further, the ICC may rely on published guidelines that provide a reasonable basis to infer, from prior certification or experience, fitness for described expansions.

B. *Scope of the fitness examination*

The Motor Carrier Act of 1980 requires the ICC, on application by individual carriers, promptly to remove unreasonably narrow restrictions in operating authority. The Act provides that restriction removal proceedings may be informal, without opportunity for oral evidentiary hearings. 49 U.S.C. § 10922(h) (2). The ICC is to "process expeditiously" each restriction removal application, "not later than 120 days after the date of application is filed," except in "extraordinary circumstances," when the ICC may extend the deadline no more than 90 additional days. *Id.* § 10922(h) (1)(B), (h)(2). These statutory provisions, and the regulations

[10] The ICC had determined that safety is the only fitness consideration relevant in restriction removal proceedings. *See* App. 53 (Restriction Removal Board's July 30, 1981, decision granting Freight Express' application and rejecting McAdams' objections). Our decision today, in line with *Steere*, *Ritter I*, and *Ritter II*, requires consideration of general fitness for the broadened certification requested—not just safety—in deciding applications to expand operating authority.

that implement them,[11] would be severely undercut if the ICC, in response to comments on a restriction removal application, were to embark on a fitness inquiry reaching back to the applicant's original certification. Given a door so widely opened, carriers seeking to obstruct expansion of their competitors' authority could protect any restriction removal proceeding by filing wide-ranging fitness challenges. Removing minor restrictions in successive applications for restriction removal might thus become more onerous than obtaining a new certificate consolidating the same authority. Congress did not intend this result.[12]

We therefore hold that when restriction removal is sought, the ICC may tailor its scrutiny of the applicant's fitness to the requested *expansion* in operating authority. If the expansion is major, the fitness inquiry should be comparable in scope to the inquiry that would be made if the applicant were applying for a new certificate. But if the changes in operating authority are interstitial, or represent a relatively minor expansion in already broad authority, the Agency's consideration of the applicant's fitness may be correspondingly modest.

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[11] The regulations specify informal notice and comment procedures. Notice of filing of a restriction removal application is published in the Federal Register, interested persons may submit comments, and, except in "extraordinary circumstances" an application is decided on the basis of its contents and written comments thereon. 49 C.F.R. §§ 1137.11, .12, .14.

[12] In two complementary, coordinated sections of the 1980 Act Congress liberalized the conditions for granting new certificates and established liberal provisions for restriction removal; the two sections are now codified back-to-back in 49 U.S.C.A. § 10922. *See* H.R. Rep. No. 1069, 96th Cong., 2d Sess. at 3, 12-18 (1980); S. Rep. No. 641, 96th Cong., 2d Sess. at 5-7, 24-25 (1980). The restriction removal provisions were intended to achieve retroactively and more expeditiously, for established carriers, what the new certificate provisions were to bring about prospectively, for new applicants.

In either case, the ICC may assume, for the purpose of the restriction removal proceeding, that the applicant is fit to operate under the authority previously granted to it. The ICC may thus exclude from the restriction removal proceeding, and reserve for separate consideration *sua sponte* or through the Commission's complaint process, a challenge that calls into question the applicant's fitness to operate under a certificate it already holds.[13]

C. *Generic fitness guidelines*

The ICC has promulgated "guidelines"[14] presenting specific examples of restriction removals it will grant routinely. 49 C.F.R. §§ 1137.20-.29. We reiterate here what we have stated before: prior operations of a kind described in Commission guidelines may serve as a sufficient indicator of fitness for certain expansions of operating authority. *See Ritter* v. *ICC*, No. 82-1023, slip op. at note 1 (D.C. Cir. Jan. 14, 1983) ("*Ritter II*"); *Ritter I*, *supra*, 684 F.2d at 87-88. For example, we suggested in *Ritter II*, slip opinion at 4, that a carrier's fitness to transport "all bulk commodities" might as a matter of course, be inferred from the breadth of its prior authority to transport numerous itemized bulk commodities. The Fifth Circuit's opinion in *American Trucking Association* v. *ICC*, 659 F.2d 452, 468 (5th Cir. 1981) ("*ATA*"), approved the ICC's use of generic

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[13] *Steere* and *Ritter I* held that it should not be *easier* to obtain broad operating authority by removing restrictions from an initially narrow certificate than by applying for a new certificate. Today we hold that it should not be *more difficult* to obtain operating authority in two or more steps than it would be to obtain the same authority in a one-step application.

[14] In American Trucking Ass'ns v. ICC, 659 F.2d 452 (5th Cir. 1981), the Fifth Circuit observed that these "guidelines" were not, in reality, guidelines, but "normative rules, [to be] evaluated as such." 659 F.2d at 464 (footnote omitted).

guidelines relating to site-to-county territorial expansions. (*See infra* p. 13.)

In short, the ICC may rely on generic guidelines that describe when applicants will be found fit to operate under described types of expanded authority. Commission management of restriction removals in this manner is supported by 49 U.S.C.A. § 10922(h)(1)(B), (h)(2). This same section of the 1980 Act justifies the Commission's refusal to reexamine, in a restriction removal context, fitness to hold prior certifications. *See supra* p. 10. The statute requires expeditious, uncomplicated restriction removal proceedings; generic guidelines may be essential to achieve that goal.

Generic guidelines must, of course, be reasonably calculated to further the statutory requirement that carriers be "fit, willing, and able," 49 U.S.C.A. § 10922(a), (b), and may not dispense with the case-by-case adjudication of restriction removal applications required by 49 U.S.C.A. § 10922(h)(1)(B).[15] But the guidelines may be engaged on a simple showing that an applicant's circumstances justify their application, and when the guidelines do apply, the ICC need not supply additional support for its inference that an applicant is fit to operate under the expanded authority sought.[16]

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[15] That section requires the ICC to "implement by regulation, procedures to process expeditiously *applications of individual motor carriers* of property seeking removal of operating restrictions . . ." (emphasis supplied). Harmoniously, 49 C.F.R. § 1137.20 states that the ICC's guidelines "are not intended to constitute a prejudgment of any individual application." *Cf.* 49 U.S.C.A. § 10922(b)(3) (new certificates may not be issued on the basis of rulemaking proceedings that develop general findings regarding public convenience and necessity). *See ATA*, *supra*, 659 F.2d at 475.

[16] Though we deal here only with territorial restrictions, guidelines addressing the removal of restrictions on commodities carried, or equipment used, may also prove acceptable. *Cf.* 49 C.F.R. §§ 1137.21, .25.

D. *The "site-only" and "Hawaii" generic restriction removal policies*

Two specific ICC generic guidelines are challenged here. The Commission has announced that territorial restrictions confining a carrier to a designated business site are presumptively too narrow; as a matter of course the ICC is prepared to replace facility-specific designations with county-wide specifications. 49 C.F.R. § 1137.24.[17] And the ICC suggests it has a settled policy that carriers authorized to serve the continental United States will routinely have their certificates extended to cover Hawaii as well.

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[17] The guideline reads:

(a) *Less than county-wide authority.* Except as indicated in paragraph (b) of this section, authorizations to serve a territory less extensive than a county (including authorizations to serve named facilities or limited in a similar manner) are considered excessively narrow. Use of these procedures is normally appropriate for applications seeking the expansion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Where an authorized service point is located within a given city as well as a county, an applicant can seek expansion of authority to the city (which includes implied authority of points in its commercial zone). Use of these procedures is also normally appropriate for applications to remove restrictions which preclude service at points or areas smaller than a county.

(b) *Service at facilities not precisely located.* Where a carrier has authority to serve a broad territory limited to service at the facilities of a specified person, company, or type of business, and where the precise location of the facilities, by reference to a city, county, or the like, is not apparent from the certificate or permit, the limitations are not considered excessively narrow, and applications for modification should not normally be filed under these procedures. These procedures can, however, be used to expand authority limited to a particular business' facilities at named points.

ATA, *supra*, addressed the first of these territorial guidelines:

> The Commission is also, upon carrier application, to "eliminate unreasonable or excessively narrow territorial limitations." 49 U.S.C.A. § 10922(h)(1)(B)(iv). The "guidelines" provide that authorizations to serve a territory less extensive than a county are considered excessively narrow. A carrier whose certificate is so restricted may seek expansion to all points in the county in which any authorized service point is located .... These standards are appropriately adapted to the elimination of unreasonable territorial limitations. A single point designation such as a particular plant site is obviously unreasonably narrow. What area extending beyond one point is wide enough not to be excessively narrow, yet not so large as to be unreasonably broad, cannot be determined for formula or crow's flight distances. The [guideline] does contemplate territorial authority broader than typically issued in the past, but the geographic areas it fixed are reasonably bounded and tailored to the purposes of the Act.... The decision is reasonable and its selection is well within the Commission's discretion.

659 F.2d at 468 (footnotes omitted). We agree with the Fifth Circuit: an applicant found fit in a prior proceeding to serve a designated site may be assumed fit to serve the county surrounding that site; no further fitness inquiry by the ICC should be required.[18] An interested party, such as McAdams, who opposes a site-to-county certificate expansion challenges more than the applicant's fitness to operate under the *new* authority sought; as already discussed, the Commision may require a challenge sweeping beyond the applicant's re-

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[18] We discern no reason, nor has McAdams suggested any, why a carrier fit to serve one designated site within a county would not be fit to serve the county as a whole.

quest to be presented separately from the restriction removal proceeding.[19]

Turning to the ICC's assumption that carriers fit to serve the continental United States are fit to serve Hawaii as well,[20] we note a threshold concern. It is unclear whether this "Hawaii" policy existed prior to the instant review petition, or whether the ICC discov-

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[19] McAdams alleges that Freight Express and two other carriers under common management are conspiring to thwart the ICC's regulations. The ICC is in fact currently investigating Freight Express' operations, and states that "[a]fter an evaluation of the evidence collected [the ICC] will institute whatever enforcement actions, if any, it deems necessary." Brief of the ICC at 40. McAdams, the ICC asserts, need not rely on the Commission-initiated investigation; it may invoke the "well-established complaint process for commencing investigation and revocation proceedings." *Id.* at 38 (footnote omitted). (McAdams has previously participated in such complaints, both as complaining party, and as respondent to a complaint filed by one of the companies McAdams now alleges is part of Freight Express' conspiracy. *Id.* at 38 n.11).

[20] Although the ICC has briefed the Hawaii exclusion removal issue, neither Freight Express nor McAdams has evinced specific concern with the matter. Freight Express' application for restriction removal, in the section describing the removals sought, mentioned only the site-to-county expansions. App. 2. However, the capsule summary of freight Express' application published in the Federal Register did note the removal of the Hawaii restriction.

For its part, before both the Commission and this court, McAdams has not attacked the Hawaii restriction removal specifically, but has alleged generally that Freight Express "is 'unfit' to serve within the scope of the application," Brief of Petitioner at 7, that Freight Express "demonstrated [its] lack of fitness to receive the subject grants of authority," *id.* at 18, and that Freight Express was unlawfully seeking "*nationwide general commodity authority*," *id.* at 23. From this we infer that McAdams challenges both the site-to-county expansions and the removal of the Hawaii exclusion in Freight Express' certificate, even though McAdams itself apparently does not, as yet, hold authority to serve Hawaii. *See supra* note 1.

ered it, post hoc, to justify to this court its disposition of the Freight Express application. The ICC states that the Hawaii restriction removal policy is inferable from a Commission policy statement on new grants of authority. Brief of the ICC at 11, citing 45 Fed. Reg. 8679[8], 86802-86803 (December 31, 1980). The cited statement does announce that "[w]here applicants [for new certificates] justify a need for service in the United States, it will include service to points in ... Hawaii," 45 Fed. Reg. 86803, but nowhere addresses applications for restriction removal. Nor is a "Hawaii" policy included with the other restriction removal guidelines at 40 C.F.R. §§ 1137.20.29. Neither the Restriction Removal Board, App. 53-54, nor the Commission, App. 78, referred to any such policy, or even noted the new certificate policy statement now cited by the ICC.

Assuming the ICC in fact has a Hawaii restriction removal policy, we are at a loss to determine how the policy rationally implements the requirement that applicants for expanded authority establish their fitness to operate under the expanded license. In reviewing the same Hawaii policy in its intended application to new certificates, the Fifth Circuit stated: "[T]he notion that any carrier fit, willing, and able to transport throughout the continental forty-eight states is ipso facto fit, willing and able, by intermodal service or otherwise, to provide service to ... Hawaii, 2,392 miles by sea or air from San Francisco, defies logic." 659 F.2d at 474. We agree.

III. The Statutory Factors Relating To Restriction Removal

The Motor Carrier Act of 1980 directs the ICC to undertake case by case restriction removal when it finds that restrictions are "wasteful of fuel, inefficient, or contrary to the public interest." 49 U.S.C.A. § 10922(h)(1)(B)(v). The ICC is required to consider

"the impact [of a restriction removal] . . . upon the consumption of energy resources, potential cost savings and improved efficiency, and . . . [to] give special consideration to providing and maintaining service to small and rural communities and small shippers." *Id.* § 10922(h)(2). The Commission's regulations require restriction removal applications to include a statement describing the anticipated effect of the proposed expansion on these statutory factors. 49 C.F.R. § 1137.10(c).

McAdams contends that Freight Express' application failed adequately to address the statutory factors;[21] on that account, McAdams urges, the ICC acted arbitrarily in granting the application. The ICC answers that the statutory factors were addressed, albeit in a single sentence;[22] in the context of Freight Express' limited application, the ICC maintains, the applicant's statement was sufficient.

Although Freight Express' "statement" concerning the statutory factors was terse and entirely conclusory, the ICC did not act arbitrarily in granting Freight Express' application without insisting on more detailed remarks. The scope of the application was narrow. The carrier evidently relied on, and the ICC applied, 49 C.F.R. §§ 1137.20, .24, which announced the ICC's view that, "under normal circumstances," site territorial designations will be found "excessively narrow, wasteful of fuel, inefficient, or contrary to the public in-

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[21] McAdams also questioned the adequacy of this aspect of the application before the Agency; the ICC found that Freight Express had sufficiently addressed the statutory factors. App. 53-54.

[22] Freight Express' application stated: "Approval of the Application will permit Applicant to provide a more responsive service to the shipping public, particularly in small or rural communities, and allow the most productive use of equipment and enegery [sic]." App. 3.

terest." That guideline is so obviously reasonable that its uncritical application cannot be termed arbitrary.[23]

CONCLUSION

Since McAdams has alleged that it operates in direct competition with Freight Express in the territorial region in question, McAdams has standing to challenge in court the ICC's grant of expanded operating authority to Freight Express.

The ICC is required to determine that applicants are fit to provide the additional service that will be authorized by restriction removal, but the Commission need examine only questions of fitness linked specifically to the expansion requested. Generic guidelines may be used to support an inference of fitness from prior operating experience or certificates already issued. The ICC's site-to-county restriction removal guideline reasonably grounds fitness to serve a county on a prior finding of fitness to serve a site within the county. It is not, however, reasonable to find a carrier fit to serve Hawaii merely on the ground that it has demonstrated fitness to serve the continental United States.

The site-to-county guideline also embodies a reasonable finding that the restriction removals it permits will promote fuel and cost savings and enhance service to small and rural shippers. For the limited purposes of its application to replace site designations with county-wide territories in its certificate, Freight Express adequately described the effect of these statutory factors.

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[23] Legislative history supports the ICC's view that site-to-county territorial expansion will further the goals of the 1980 legislation. "The elimination of an excessively narrow territorial restriction, such as [a plantsite designation] . . . could be accomplished by granting authority to transport from the county instead of from, simply, the plantsite within the county." 126 Cong. Rec. H5410 (daily ed. June 19, 1980) (remarks of Representative Howard).

The ICC's decision is affirmed in principal part. The Commission's order is vacated only insofar as its grants Freight Express authority to serve Hawaii.